

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL S. URBINA,
Appellant,
vs.
GEORGIA GILFILEN,
Appellee.

No. 2 1 6 7 9

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FILED

AUG 1 1967

WM. B. LUCK, CLERK

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1 IN THE
2 UNITED STATES COURT OF APPEALS
3 FOR THE NINTH CIRCUIT
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6 DANIEL S. URBINA,

7 Appellant,

8 vs.

9 GEORGIA GILFILEN,

10 Appellee.
11

No. 21679

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I

STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of Appellee, Georgia Gilfilen, rendered by the United States District Court for the District of Hawaii, in a libel action by the Appellant against the Appellee. (CTR 55) The action was commenced in the Hawaii State Court (CTR 11) and transferred to the United States District Court under the provisions of 28 U.S.C. 1442 (a). No Court Order was entered authorizing said transfer. (CTR) Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. A timely notice of appeal was filed on October 25, 1966, (CTR 58) within thirty days after entry of judgment on September 26, 1966 (CTR¹ 55).

¹Parenthetic references preceded by "CTR" are to the Clerk's Transcript of Record; and by "TR" to the transcript of proceedings in the District Court.

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II

STATEMENT OF THE CASE

A. The Nature of the Controversy.

Appellant, Daniel S. Urbina, filed this action of libel in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 19556, on July 11, 1966, alleging that Appellant and Appellee were both employees of the United States Air Force at Honolulu, Hawaii, and charging the Appellee with having written an untrue, false and defamatory memorandum concerning the Appellant with reckless disregard as to the falsity of the allegations contained therein as a result of which the Appellant was prejudiced and damaged in his career with the Federal Government and profession and suffered general damages in the total amount of \$100,000.00 and special damages as determined after filing of the suit (CTR 11). Upon motion of the Appellee, the action was removed to United States District Court for the District of Hawaii on about August 8, 1966. No Order was entered by the Court authorizing this transfer (CTR). Appellant filed a Motion to Remand on or about August 11, 1966, (CTR 23) and Appellee filed a Motion to Dismiss Complaint and for Summary Judgment on or about September 12, 1966 (CTR 30). After a hearing on both motions on September 22, 1966, the Court denied Appellant's Motion to Remand and granted Appellee's Motion for Summary Judgment. Judgment was entered in

1 favor of Appellee and against Appellant on September 26, 1966
2 (CTR 55).

3 Appellant has filed a companion action in the United
4 States Court of Claims No. 113-63 entitled Daniel S. Urbina v.
5 United States based upon the same circumstances as those in
6 the instant case for recovery of damages against the United
7 States Government for the wrongful termination of his employ-
8 ment based upon an alleged false claim for reimbursement of
9 quarters allowance. By decision dated May 12, 1967, the United
10 States Court of Claims granted Appellant's Motion for Summary
11 Judgment with the amount of the recovery to be determined in
12 further proceedings. The Court's opinion is set forth in 180
13 Ct. Cl. ____ and is incorporated by reference as though fully
14 set forth herein.

15 Appellant has appeared throughout these proceedings in
16 pro per until represented in this Court by his present attorney
17 Arthur H. Tibbits, Esq. on or about March 3, 1967.

18 B. Questions presented:

19 The only questions presented on this appeal are whether
20 (1) the District Court had jurisdiction of this action in the
21 absence of an Order and Notice to this effect as provided by
22 FRCP 77(d), and (2) the judgment below was properly entered upon
23 Appellee's Motion for Summary Judgment where factual issues were
24 presented upon the Appellant's Complaint and the affidavits
25 filed on behalf of Appellant and Appellee.

1 C. Specifications of Error.

2 The District Court erred as a matter of law in taking
3 jurisdiction of this action without an order having been entered
4 transferring the action from the State Court to the United
5 States District Court.

6 The District Court erred as a matter of law in holding
7 that Appellee acted within the outer perimeter of her line of
8 duty in submitting the written memorandum dated July 13, 1961
9 to her supervisor.

0 The District Court erred in entering a judgment upon
1 Appellee's Motion for Summary Judgment where a factual issue
2 was raised by the pleadings and affidavits.

III

ARGUMENT

1
2 A. The District Court was without jurisdiction of this action,
3 no Order having been entered transferring it from the State
Court.

4 The Appellant initiated this action on July 11, 1966 in
5 the Hawaii State Court (Circuit Court of the First Circuit,
6 State of Hawaii, Action No. 9556). (CTR 10 to 13). The Appell
7 on July 26, 1966, filed a Petition for Removal of this action
8 to the United States District Court for the District of Hawaii
9 (CTR 1 to 9, 14 to 15). On July 28, 1966, the Appellee filed
10 a "Motion to Extend Time to Answer or Otherwise Plead to the
11 Complaint" in the District Court. (CTR 16-18). On August 3,
12 1966, the Appellant filed "Appellant's Objection to Defendant's
13 Petition for Removal" filed herein July 26, 1966 (CTR 19). On
14 August 4, 1966, Appellant further filed "Plaintiff's Response t
15 Defendant's Purported Motion to Extend Time to Answer or Other-
16 wise Plead to the Complaint in Notice of July 28, 1966",
17 objecting to Appellee's "Motion to Extend Time to Answer or
18 Otherwise Plead to the Complaint" on the ground that Appellee's
19 Petition for Removal from the State Court to the District Court
20 had not been acted upon. Nevertheless, on August 8, 1966, an
21 order was entered in the District Court granting Appellee's
22 Motion to Extend Time to Answer or Otherwise Plead to the Com-
23 plaint.

24 It does not appear, however, that an Order was entered
25 by the District Court granting Appellee's Petition for Removal

1 or that a notice of said Order was mailed to Appellant by the
2 Clerk of the District Court as required by the Federal Rules of
3 Civil Procedure, Rule 77(d). Accordingly, the District Court
4 was without jurisdiction of this action and its Order granting
5 Summary Judgment for the Appellee entered September 26, 1966
6 was and is of no legal effect. The Summary Judgment should be
7 set aside and the action should be remanded to the District
8 Court for further proceedings therein on this ground alone.

9
10 B. A genuine issue of a material fact existed upon the Com-
11 plaint and the Affidavits filed in support of and in
opposition to Appellee's Motion for Summary Judgment.

12 The Complaint alleged in substance that Appellant and
13 Appellee were both civilian employees of the United States Air
14 Force at Honolulu, Hawaii; a dispute arose between the Appellant
15 and Arthur W. Palman, Chief of the Civilian Personnel Division,
16 and Appellee's supervisor, over the sum of \$645.54; the dispute
17 was reflected in certain false and unfounded allegations made
18 by Mr. Palman concerning the Appellant in a letter dated July 3,
19 1961, and Appellant's reply thereto dated July 7, 1961; the
20 Appellee was designated by Mr. Palman to advise and assist the
21 Appellant in preparation of said reply dated July 7, 1961;
22 Appellee wrote a memorandum dated July 13, 1961 to Mr. Palman
23 charging Appellant with untrue and false and defamatory matters,
24 knowing the same to be false. As a result of
25

1 said memorandum Appellant was damaged in his career with the
2 Federal Service and in his profession (CTR 10 to 13).

3 Mr. Palman's letter to Appellant dated July 3, 1961,
4 referred to above was entitled "Notice of Proposed Removal"
5 and charged him with having submitted false claims for reim-
6 bursement of quarters allowance pertaining to a house in Tokyo
7 based on his claimed ownership of said house.^{1/} (Exhibit "C"
8 to Appellee's Motion to Dismiss Complaint and for Summary Judg-
9 ment) (CTR 43-45). In this letter, Mr. Palman states in part
10 (CTR 44):

11 "Your written reply should be addressed to the under-
12 signed. Advice and assistance in preparing your
13 reply may be obtained from your Placement and Em-
14 ployee Relations Advisor, Miss Georgia Gilfilen"

15 Appellee's written memorandum dated July 13, 1961, re-
16 ferred to above, which is the subject of this controversy,
17 reads in part as follows: (Attachment to Exhibit "A" to
18 Appellee's Motion to Dismiss Complaint and for Summary Judgment)
(CTR 33).

19 "3. It has been established beyond a reasonable doubt
20 that:

- 21 a. Mr. Urbina owns the house in question, either
wholly or in part.
- 22 b. He submitted false claims for reimbursement
23 of Personally Owned Quarters Allowance.
- 24 c. He submitted false claims for reimbursement
25 of Private Rental Allowance while occupying
self-owned quarters." (Underscoring added)

^{1/} Appellant in fact was not the owner of this house nor did he
claim any ownership of it.

1 That these statements by the Appellee in her written
2 memorandum of July 13, 1961 were untrue has been established
3 and adjudicated by the Court of Claims in its decision rendered
4 May 12, 1967 in favor of the Appellant and against the United
5 States Government in proceedings entitled Urbina v. United
6 States, Action No. 113-63. The Court of Claims stated as follow
7 at page 9 of its printed decision, as yet unreported:

8 "On the central issue involved as to the ownership of
9 the property, it was shown conclusively that neither
10 plaintiff nor his wife then owned the house or land,
and that such ownership was in plaintiff's brother-
in-law and father-in-law." (Underscoring added)

11 In her Motion to Dismiss the Complaint and for Summary
12 Judgment the Appellee attached two affidavits, one by Arthur
13 G. Palman and one by herself. Mr. Palman in his affidavit state
14 that the Appellee was at the time of writing the memorandum of
15 July 13, 1961, an employee working under his direction and con-
16 trol, and had prepared the memorandum at his request. The
17 affidavit of the Appellee in essence corroborated Mr. Palman's
18 affidavit in stating that the memorandum in question was pre-
19 pared by her at the direction of Mr. Palman and in the course
20 of her employment. (CTR 32, 34-35)

21 The Appellant denied the Appellee's claim that she was
22 acting in the course of the outer perimeter of her duty as an
23 employee of the government in his affidavit attached to his
24 Motion to Remand which reads in part as follows: (CTR 26.)
25

1 "2. That defendant's negligent or wrongful acts are
2 beyond the outer perimeter of line of duty of
3 federal employees which does not constitute acts
4 under color of office within the meaning of the
5 removal statute as alleged in defendant's
6 petition to remove filed herein July 26, 1966."

7 It is clear from the foregoing that a genuine issue of
8 fact existed at the time the Court entered its Order granting
9 Summary Judgment, to-wit: Did the Appellee prepare the written
10 memorandum of July 13, 1961 at the request of her supervisor,
11 Mr. Palman? If she did, then under the more recent decisions
12 she would have been acting within the outer perimeter of line
13 of duty and her memorandum would be absolutely privileged. On
14 the other hand, if she had not been so authorized, but had been
15 merely requested and authorized to advise and assist the Appel-
16 lant in the preparation of his response to the removal action
17 initiated against him, then her written memorandum would be
18 only conditionally privileged, and if malice and the other
19 elements of a libel action were shown, then Appellant would be
20 entitled to recovery.

21 Barr v. Matteo, 360 U.S. 564
22 Preble v. Johnson, C.A. 10 1960, 275 F. 2d 275

23 Appellant respectfully submits that the true extent of
24 Appellee's employment is revealed by Mr. Palman's letter dated
25 July 3, 1961, in which he expressly designated the Appellee,
Georgia Gilfilen, to advise and assist the Appellant in prepar-
ing a reply to his letter of July 3, 1961 (CTR 44), and by

1 Appellee's affidavit dated July 26, 1961 filed in support of
2 her Petition for Removal filed on July 29, 1966, in which she
3 stated that she was designated to assist the Appellant in pre-
4 paration of such a reply (CTR 5-6). No where in Mr. Palman's
5 earlier letter of July 3, 1961, or in Appellee's earlier affi-
6 davit dated July 26, 1966 was there any indication or mention
7 that the Appellee was designated or authorized to review the
8 charges leveled against the Appellant and to submit a memorandum
9 in connection therewith. The only basis for such alleged desig-
10 nation or authorization appears in later affidavits of Mr. Palman
11 dated August 31, 1966 and of Appellee dated September 12, 1966
12 filed in connection with her Motion to Dismiss and for Summary
13 Judgment (CTR 32, 34-35) which appear to be an after thought.
14 Accordingly, on the basis of Appellee's own supporting affidavit
15 there appears to be a genuine question as to Appellee's authority
16 to act in connection with the preparation of her written memoran-
17 dum of July 13, 1961.

18 The District Court apparently relied solely on the later
19 affidavits of the Appellee and Mr. Palman in connection with
20 Appellee's Motion for Summary Judgment and overlooked entirely
21 the inconsistency between these affidavits and the earlier letter
22 of Mr. Palman and the earlier affidavit of the Appellee referred
23 to above, in both of which the statements are made that Appellee
24 was merely designated to assist the Appellant and not to write a
25 memorandum substantiating the charges against him. (TR 21-29)

1 Finally, Appellee's title "Placement and Employee Relations Ad-
2 visor" (see Palman's letter of July 3, 1961) (CTR 44) demon-
3 strates that Appellee's authority was confined to advising em-
4 ployees not to reviewing administrative charges against them.
5 In any event Appellant submits this apparent conflict in the
6 affidavits in support of her Motion for Summary Judgment raises
7 an issue as to the credibility of said affidavits which may not
8 be decided by summary judgment.

9 C. Where there is a genuine issue of material fact, it is
10 improper to enter a Summary Judgment.

11 The function of a Summary Judgment is to avoid a useless
12 trial; and a trial is not only useless but absolutely necessary
13 where there is a genuine issue as to any material fact. In rul-
14 ing on a Motion for Summary Judgment, the Court's function is
15 to determine whether such a genuine issue exists, not to resolve
16 any existing factual issues; and to deny Summary Judgment where
17 is a genuine issue as to any material fact.

18 U. S. v. Diebold, Inc., 369 U.S. 654
19 Browner v. Pearl Assurance Co., C.A. 9 (1958) 267 F 2d
20 45,46
See 6 Moore's Federal Practice § 56.15 at ps. 2281, et

21 The Ninth Circuit has insisted that a judgment cannot
22 validly be based upon the summary trial by affidavits, and that
23 the parties are entitled to have issues of fact tried at trial
24 through introduction of exhibits and witnesses produced for dire
25 and cross examination.

Lane Bryant v. Maternity Lane Ltd. of Calif., C.A. 9
1949, 173 F. 2d 559,565, 173 F 2d 559,565

1 Finally a plaintiff is not entitled to summary judgment
2 where his credibility and that of his supporting affiants is in
3 issue.

4 Kasper v. Baron
5 CA 8 1951, 191 F 2d 737, 738

6
7 CONCLUSION

8 It is respectfully submitted, for each of the reasons
9 hereinabove set forth, that the judgment entered in favor of
10 Appellee and against Appellant be reversed and the action
11 remanded for further proceedings in the District Court.

12 Dated, San Francisco, California,

13 July 30, 1967

14 Respectfully submitted,

15 *Arthur H. Tibbits*

16 Arthur H. Tibbits,
17 Attorney for Appellant Daniel S.
18 Urbina
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CERTIFICATE OF COUNSEL

I, ARTHUR H. TIBBITS, the attorney for Appellant Daniel S. Urbina, do hereby certify that I have examined the provisions of Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the Appellant's Opening Brief tendered on behalf of said Appellant conforms to all requirements thereof.

Dated: July 30, 1967

Arthur H. Tibbits

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3 ARTHUR H. TIBBITS, ESQUIRE, certifies that he is an
4 active member of the State Bar of California and that his
5 business address is 55 New Montgomery Street, San Francisco,
6 California 94105, that he has served a copy of the attached
7 Opening Brief of Appellant DANIEL S. URBINA by placing a copy
8 in an envelope addressed to the following person at his office
9 address:

10 Herman T. F. Lum
United States Attorney.
11 District of Hawaii
United States Department of Justice
12 Honolulu, Hawaii

13 Attention: Yoshimi Hayashi
Assistant U.S. Attorney

15 The envelope was then sealed and postage fully prepaid
16 and on August 1, 1967, was deposited in the United States
17 mail at San Francisco, California.

18 Executed on August 1, 1967 at San Francisco, California.

19. *Adiantum* sp.

